Filed 2/5/19 P. v. Yarbrough CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ELBERT ANTHONY YARBROUGH, Defendant and Appellant.	2d Crim. No. B291198 (Super. Ct. No. 17CR07635) (Santa Barbara County)

Elbert Anthony Yarbrough appeals the judgment entered following a court trial in which he was convicted of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and trespassing on private property (Pen. Code, § 602, subd. (m)).[1] The court also found true allegations that appellant had suffered prior strike and serious felony convictions (§§ 667, subd., (e)(1), 1170, subd. (h)(3)) and had served six prior prison terms (§ 667.5,

[1] All statutory references are to the Penal Code unless otherwise stated.

subd. (b)). The court sentenced appellant to five years and eight months in state prison. Appellant contends the court erred in denying his motion to suppress the methamphetamine found in his possession. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant was charged by information with possessing methamphetamine (count 1), engaging in lewd conduct (§ 647, subd. (a)); count 2), and trespassing on private property (count 3), with attendant prior serious felony, strike, and prior prison term allegations. Appellant moved to suppress the methamphetamine pursuant to section 1538.5. Santa Barbara Police Officer Christina Ortega testified that on the evening of July 25, 2017, she responded to a report of trespassing at a private office building in Santa Barbara. The officer entered the stairwell of the building and saw appellant sitting on the stairs with his sweatpants around his ankles, his penis exposed, and a woman sitting between his legs. Appellant's sweatpants were tucked into his socks. When told to pull up his pants, he replied that he was "having some fun" and asked, "[W]hat would you do if you were homeless and horny[?]"

While appellant was sitting on the stairs, Officer Ortega observed a small bulge on the outside of his right sock. Based on her experience, the officer believed that appellant was concealing narcotics in his sock. The officer reached into the sock and removed a baggie containing methamphetamine. Either before or after retrieving the methamphetamine, the officer also ran appellant's name and discovered he was on parole. Appellant was formally arrested and placed in handcuffs.

At the conclusion of the hearing, the trial court denied appellant's motion to suppress. The court found that prior to

searching appellant's sock, Officer Ortega had probable cause to arrest him for trespassing and engaging in lewd conduct. The court reasoned, among other things, that "even if [the officer] didn't make the arrest . . . until later . . . doesn't negate the fact that probable cause existed at the time she made the observations of the two individuals in a private building where they were engaging in what looked to be . . . unlawful activity. [¶] . . . [O]nce there's probable cause then you can do a search incident to arrest."

Prior to trial, the lewd conduct charge was dismissed pursuant to the parties' stipulation. Appellant waived his right to a jury and the matter proceeded to a court trial. At the conclusion of the trial, the court found appellant guilty on counts 1 and 3, and found all of the enhancement allegations to be true.

DISCUSSION

Appellant contends the trial court erred in denying his motion to suppress. He asserts that the warrantless search of his sock cannot be justified as a valid search incident to his arrest because the crimes for which Officer Ortega had probable cause to arrest him when the search was conducted—trespassing on private property and engaging in lewd conduct—are both misdemeanors. We disagree.

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

"A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the 'specifically established and well-delineated exceptions.'" (*People v. Woods* (1999) 21 Cal.4th 668, 674.) A search incident to a lawful arrest is one such exception. (*Arizona v. Gant* (2009) 556 U.S. 332, 338 [173 L.Ed.2d 485, 493].) A search incident to an arrest may precede the actual arrest where (1) probable cause to arrest existed prior to the search, and (2) the arrest followed shortly after the search. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 [65 L.Ed.2d 633, 646]; *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1239–1240.)

Appellant concedes that prior to retrieving the methamphetamine from his sock, Officer Ortega had probable cause to arrest him for trespassing on private property in violation of section 602, subdivision (m), and/or for engaging in lewd conduct in violation of section 647, subdivision (a). It is also undisputed that the officer formally arrested him immediately after the challenged search. He nevertheless contends that his search cannot be validated on this ground because the officer could have simply issued him a citation for the offenses, which are both misdemeanors. (See § 853.6.) We are not persuaded.

An officer may make a misdemeanor arrest when he has "probable cause to believe that the person to be arrested has committed a public offense in the officer's presence." (§ 836.) Although the officer may cite and release a person charged with a misdemeanor pursuant to the procedures set forth in section 853.6, it may only do so if the defendant "does not demand to be taken before a magistrate." (§ 853.6, subd. (a)(1).) Even if appellant could establish he was entitled to be cited and released pursuant to a promise to appear, the statute makes clear that

"nothing prevents an officer from first booking an arrestee" (*ibid.*) either "at the scene or at the arresting agency prior to release." (*Id.*, subd. (g).) Because Officer Ortega had the authority to arrest and book appellant for the misdemeanors notwithstanding section 853.6, she also had the authority to search appellant incident to his arrest for those crimes. (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354 [149 L.Ed.2d 549, 577] ["If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender"].)

Knowles v. Iowa (1998) 525 U.S. 113 [142 L.Ed.2d 492] (*Knowles*), does not compel a different result. The defendant in that case was stopped for speeding. Under Iowa law, the officer who conducted the stop had the authority either to take the defendant into custody or issue him a citation. The officer chose to issue a citation. After doing so, the officer searched the defendant's car, found drugs, and arrested him. (*Id.* at p. 114.) In upholding the search, the Iowa Supreme Court relied upon a state statute providing that "the issuance of a citation in lieu of an arrest 'does not affect the officer's authority to conduct an otherwise lawful search.'" (*Id.* at p. 115.) In reversing, the United States Supreme Court reasoned that "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." (*Id.* at p. 118.)

Knowles is inapposite. Appellant was not searched after being issued a citation for a traffic infraction. (See *People v.*

Espino (2016) 247 Cal.App.4th 746, 763, citations omitted ["For most traffic infractions [in California], officers may not make a custodial arrest unless some other condition arises–e.g., the motorist fails to produce a driver's license or other identification"].) He was subject to a custodial arrest for two misdemeanors prior to the search, notwithstanding that the formalities of the arrest followed the search. In any event, whether Officer Ortega could have merely cited and released appellant as provided in section 853.6 has no bearing on the determination whether appellant's search was valid under the Fourth Amendment. (*Virginia v. Moore* (2008) 553 U.S. 164, 178 [170 L.Ed.2d 559, 571]; *People v. McKay* (2002) 27 Cal.4th 601, 605, 608–611, 618.) Under Proposition 8 (Cal. Const., art I, § 28), a court cannot exclude evidence at trial as a remedy for an unreasonable search unless that remedy is required by the federal Constitution. (*People v. McKay*, *supra*, at p. 608.) No such remedy is required here.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Brian E. Hill, Judge
Superior Court County of Santa Barbara

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

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